PD-0787-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/28/2019 9:31 PM
Accepted 1/29/2019 9:22 AM
DEANA WILLIAMSON
CLERK

NO. PD-0787-18

FILED
COURT OF CRIMINAL APPEALS
1/29/2019
DEANA WILLIAMSON, CLERK

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

DEMOND FRANKLIN
Appellant-Petitioner

v.

STATE OF TEXAS
Appellee-Respondent

Appealed from:

The 290th Judicial District Court, Bexar County, Texas &

Fourth Court of Appeals, San Antonio, Texas;

Cause No(s).: [2015CR6149A] & [04-17-00139-CR], respectively.

APPELLANT'S BRIEF

DEAN A. DIACHIN
Bexar County Asst. Pub. Defender
Paul Elizondo Tower
101 W. Nueva, Suite 370
San Antonio, Texas 78205
Ph: (210)-335-0703
Fax: (210)-335-0707

ATTORNEY FOR APPELLANT.

ORAL ARGUMENT:
[REQUESTED].

IDENTITY OF JUDGE(S), PARTIES, & COUNSEL

Pursuant to TEX. R. APP. P. 68.4(a) (West 2017), the parties and representatives to this action are as follows:

(1) Appellant: DEMOND FRANKLIN, T.D.C.J. No.: 02119674, Telford Unit; 3899 Hwy. 98, New Boston, TX 75570.

(2) Appellee: STATE OF TEXAS, by and through the Bexar County District Attorney's Office; 101 W. Nueva St., Suite 710, San Antonio, TX 78205.

The trial attorneys are:

(3) For appellant: M'LISS CHRISTIAN, TBN: 13416550; 111 Soledad, Suite 358, San Antonio, TX 78205-2230; F. ALAN FUTRELL, TBN: 07562725; 319 Maverick St., San Antonio, TX 78212-4637; VINCENT D. CALLAHAN, TBN: 03651700; P.O. Box 12141, San Antonio, TX 78212-0141.

(4) For the State: WENDI K. WILSON, TBN: 24003241; KRISTINA A. ESCALONA, TBN: 24047443; JAMES H. ISHIMOTO, TBN: 24002339; DAVID MARTIN, TBN: 24048637; Bexar County District Attorney's Office, 101 W. Nueva St., San Antonio, TX 78205.

The appellate attorneys are:

(5) For appellant: DEAN A. DIACHIN, TBN: 00796464; Bexar County Public Defender, 101 W. Nueva St., Suite. 370, San Antonio, TX 78205.

(6) For the State: JAY BRANDON, TBN: 02880500, Bexar County District Attorney's Office; 101 W. Nueva St., Suite 710; San Antonio, TX 78205.

The trial court(s) are:

(7). The HON. LAURA L. SALINAS, 166th District Court, 100 Dolorosa St., San Antonio, TX 78205;

(8). The HON. MELISA CHARMAINE SKINNER, 290th District Court, 300 Dolorosa St., San Antonio, TX 78205; &

(9). The HON. KEVIN MICHAEL O'CONNELL, 227th District Court, 300 Dolorosa St., San Antonio, TX 78205.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CONSTITUTIONS:

CODES:

RULES:

CASES:

SECONDARY MATERIALS:

STATEMENT ON RECORD CITATIONS

The reporter's record will be cited as "RR" and the clerk's record will be cited as "CR." For example: (4 RR 135-137) is meant to reference "Reporter's Record, Volume 4, pages 135 through 137." Trial exhibits will be cited: (14 RR __ [SX-__]) & (14 RR __ [DX-__]), respectively. The reporter's record, which consists of eighteen [18] volumes by six [6] different court reporters (Debbie Jimenez, Erminia Uviedo, Angeliz Rivera, Maria Fattahi, Mary Beth Sasala, & Carol Castillo) will be cited chronologically as follows:

(1 RR ___)	=	D. Jimenez, Vol. 1:	["Hearing"];
(2 RR ___)	=	E. Uviedo, Vol. 1:	["Motions"];
(3 RR ___)	=	A. Rivera, Vol. 1:	[Mt. for Continuance];
(4 RR ___)	=	M. Fatahi, Vol. 1:	["Pretrial Proceedings"];
(5 RR ___)	=	M.B. Sasala, Vol. 1:	[Master Index-Trial];
(6 RR ___)	=	M.B. Sasala, Vol. 2:	[Pretrial Motions];
(7 RR ___)	=	M.B. Sasala, Vol. 3:	[Voir Dire];
(8 RR ___)	=	M.B. Sasala, Vol. 4:	[Trial Evidence];
(9 RR ___)	=	M.B. Sasala, Vol. 5:	[Trial Evidence];
(10 RR ___)	=	M.B. Sasala, Vol. 6:	[Trial Evidence];
(11 RR ___)	=	M.B. Sasala, Vol. 7:	[Trial, Closings, Verdict & Punishment];
(12 RR ___)	=	M.B. Sasala, Vol. 8:	[Mt. New Trial];
(13 RR ___)	=	M.B. Sasala, Vol. 9:	[Mt. New Trial];
(14 RR ___)	=	M.B. Sasala, Vol. 10:	[Trial Exhibits];
(15 RR ___)	=	N. Castillo, Vol. 1:	[Master Index-Mt. Reconsider M.N.T.];
(16 RR ___)	=	N. Castillo, Vol. 2:	[Mt. Reconsider M.N.T.];
(17 RR ___)	=	N. Castillo, Vol. 3:	[Mt. Reconsider M.N.T.];
(18 RR ___)	=	N. Castillo, Vol. 4:	[Mt. Reconsider M.N.T.].

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully renews his request for oral argument. The instant grounds for review are important to Texas jurisprudence for several reasons. First, this case involves a capital offense, which, while non-death, still carries some of the harshest penalties known to Texas law. Second, oral argument would help to resolve "an important question of state [and federal]…law that has not been, but should be, settled by the Court of Criminal Appeals." TEX. R. APP. P. 66.4(b) (West 2017). Indeed, if appellant's prayer herein is granted, this case would change how capital cases must be pled and proved in the state of Texas. Finally, and perhaps most importantly, from the perspective of sheer justice, the record contains evidence that the most culpable individuals here—the admitted mastermind & likely actual shooter—simply won a race to cut plea agreements, and could thus be paroled in as little as fifteen [15] and seven-and-half [7.5] years, respectively. Absent a reformation, appellant, on the other hand, is due to die in prison. Oral argument will no doubt aid the Court in determining how existing statutes and Constitutional precedent ought to be applied to a novel fact situation likely to reoccur in future capital litigation. Given the grave stakes involved, appellant respectfully requests that oral argument be permitted.[1]

1. On a lesser note, the case is also important because it will aid counsel in securing the credentials necessary for board certification in criminal appellate law.

STATEMENT OF THE CASE

In two [2] counts, appellant was charged by indictment on June 10, 2015 with (1) capital murder [Count I], and (2) the lesser-included offense of felony murder [Count II], all alleged to have occurred on October 22, 2014.[2] (1 CR 8). The State waived the death penalty on December 1, 2016. (2 RR 3). A jury was sworn on December 5, 2016, [7 RR 1, 188], which is the same date appellant elected the jury to assess punishment if convicted. (1 CR 158); (7 RR 52-53). Appellant was found guilty of the capital murder on December 12, 2016. (1 CR 195); (11 RR 104). The trial court assessed penalty at life without parole. (1 CR 195); (11 RR 104). The trial court certified appellant's right of appeal that same date, December 12, 2016. (1 CR 197).

After several hearings before two [2] different trial Judges, appellant's motion(s) for a new trial were denied on February 24, 2017. (1 CR 286, 290, 291); (18 RR 10). The Bexar County Public Defender's Office was appointed to serve as appellate counsel on March 3, 2017. (1 CR 294). The court of appeals affirmed this judgment on June 27, 2018.[3] This Court granted appellant's timely petition for discretionary review on December 12, 2018. This appeal then followed.

---

2. Both counts allege the same death and means of causation. (1 CR 8).

3. *See Franklin v. State*, 04-17-00139-CR, 2018 WL 3129464, at *6 (Tex. App.—San Antonio 2018, pet. granted) (mem. op., not designated for publication).

GROUNDS FOR REVIEW

Ground for Review No. 1

THE COURT OF APPEALS ERRED IN RULING THAT APPELLANT'S *MILLER v. ALABAMA* CLAIM WAS FORFEITED BY INACTION.

Ground for Review No. 2

THE COURT OF APPEALS ERRED BY RULING THE AGE OF THE DEFENDANT AT THE TIME OF THE OFFENSE IS AN AFFIRMATIVE DEFENSE FOR WHICH THE DEFENDANT BEARS THE BURDEN OF PROOF.

Ground for Review No. 3

EVEN IF DEFENDANTS BEAR THE BURDEN TO PROVE WHEN THEY WERE BORN, THE COURT OF APPEALS ERRED IN AFFIRMING THE INSTANT JUDGMENT BECAUSE THE TRIAL COURT NEVER SECURED EITHER AN EXPRESS WAIVER FROM APPELLANT, ADMISSION FROM APPELLANT, OR FINDING OF FACT THAT APPELLANT WAS INDEED OVER THE AGE OF EIGHTEEN [18] ON OCTOBER 22, 2014.

---

3. (Cont'd.) That said, the delivery of a memorandum opinion was improper in this case because this appeal involves: (1) federal & state constitutional issues important to the jurisprudence of Texas; and (2) application of existing rules to a novel fact situation likely to recur in future cases. *See* TEX. R. APP. P. 47.4(a),(b) (describing circumstances in which memorandum opinions are inappropriate). The rules of law at issue here were announced in: *Miller v. Alabama*, 567 U.S. 460 (2012) and *Garza v. State*, 435 S.W.3d 258 (Tex. Crim. App. 2014).

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

Mr. Demond Franklin, appellant, files this brief by and through his appellate counsel of record, Mr. Dean A. Diachin, Bexar County Assistant Public Defender, and in support thereof would show this Honorable Court the following:

STATEMENT OF FACTS

Only the facts pertinent to the instant grounds for review will be provided here.[4] TEX. R. APP. P. 38.1(g) (West 2017); *see also* TEX. R. APP. P. 9.4(i)(2)(B) (West 2017) (limiting brief in non-death capital case to 15,000 words).

I. General Background

There is no dispute that, in the early morning hours of October 22, 2014, Deandre Thompson was fatally shot during a robbery in his mother's apartment in San Antonio, Texas. Both charges that resulted allege appellant was the shooter. *See* (1 CR 8, 207, 211) (containing instant indictment & "application paragraphs" in trial court's jury charge). In an attempt carry its burden, the State called a total of nineteen [19] witnesses, including a pair of purported accomplices, Daniel Martinez & Ryan Hardwick. *See, e.g.*, (8 RR 135-211) (containing Martinez' testimony); (10 RR 99-210) (containing Hardwick's testimony).

4. A more complete summary of the testimony offered below is included in appellant's briefs to the court of appeals. *See* Appellant's Amended Br., p. 1-27 (filed & "accepted" October 26, 2017).

In an attempt to preserve the presumption of innocence, the defense presented a total of three [3] witnesses, of which only two [2] were allowed to testify before the jury. Appellant did not testify.

II. Specific Facts Pertinent to Grounds for Review

The cooperation of Martinez & Hardwick was induced by plea agreements that remained pending when they testified. *See, e.g.,* (8 RR 137) (confirming Martinez received a "Cap of 15 [years for] aggravated robbery" in exchange for his testimony against appellant); (10 RR 107) (confirming Hardwick—the likely actual shooter—*was gifted* a "Cap of 30 years in TDCJ" in exchange for his testimony against appellant).

The instant offense was masterminded by Daniel Martinez. *See, e.g.,* (8 RR 156) (asking Martinez, "Q:…this whole thing was your idea, right? A: Yes, ma'am"); (8 RR 192) (asking, "It was your idea, right? A: Yes"); (8 RR 202) (asking, "Q:… You were the one that proposed this idea?..A: Yes"). Specifically, in the late evening of October 21, 2014, after appellant volunteered that he was "hurting for cash," Martinez suggested they rob his friend and drug dealer, Deandre Thompson. (8 RR 142); *see also* (8 RR 211) (asking, Q: Mr. Martinez, Deandre was your friend, right? A: Yes, I considered him a friend"). Martinez confirmed Ryan Hardwick was not just present during the planning, but participated in the robbery. (8 RR 141, 164-65).

Martinez also said everyone knew a gun would be taken. (8 RR 143-144). According to Martinez, the "[p]lan was just to hold him at gunpoint and…get everything that he had…[and] just leave. Nothing else was supposed to happen."[5] (8 RR 144).

Martinez drove all three [3] men to the complainant's apartment complex. (8 RR 146). Martinez played video games with the complainant while Hardwick and appellant waited outside. (8 RR 146, 169). Appellant's phone was last used in the coverage area where the complainant lived at 12:39 a.m. (10 RR 54); (14 RR 100 [SX-77]); (9 RR 163, 182, 204, 230). Right afterwards—from 12:41 a.m. and 2:21 a.m.—the phones belonging to Martinez and Hardwick exchanged no less than forty [40] text-messages.[6] (10 RR 54). The exact content of those texts is lost to the ages. *See* (10 RR 50) (stating, "a lot of times you just don't get [verbatim text] when you request the records, because the timeframe [to obtain that information] has passed").

5. Records from Sprint and Verizon place the cell phones of all three [3] defendants inside roughly the same coverage area that includes appellant's address at 7141 Oaklawn #119 in San Antonio, TX, during the late evening of October 21, 2014. *See* (10 RR 47-52) & (14 RR 99 [SX-76]) (noting usage of each phone varied from 10:06 p.m. to 11:55 p.m. on 10-21-14). The records also indicate that, by 12:15 a.m. on October 22, 2014, all three [3] phones had relocated to a different coverage area that included the complainant's address at 13658 O'Connor Road #508 in San Antonio, TX. (10 RR 53-55); (14 RR 100 [SX-77]).

6. The next documented use of appellant's phone did not occur until 3:22 a.m., within a coverage area near I-35 & Loop 410, several miles away from the complainant's residence. (10 RR 55); (14 RR 101 [SX-78]). Thus, appellant may well have abandoned the plan, altogether, as early as 12:39 a.m. on October 22, 2014.

From the privacy of Thompson's bathroom, Martinez alerted Hardwick that Thompson was by the front door of his apartment because they were leaving to get something to eat. *See* (8 RR 147-48, 180) (stating, "I went into the bathroom to text [Hardwick] that we were leaving…And I suppose I said 'it's time'"). Martinez stated that, as he exited Thompson's bathroom, he heard the front door kicked-in and shots being fired, but he did not see the shooter. *See, e.g.*, (8 RR 203) (asking, "Q: You didn't see who came through that door, did you, Mr. Martinez? A: No"); (8 RR 181-182) (asking, Q: So…you don't see who shoots [the gun], right? A: No, ma'am [I didn't look up the whole time]"). Martinez then heard "rummaging" in Thompson's bedroom for about "five to seven minutes," and whoever had entered the apartment then left. (8 RR 149, 183).

Shortly after the shots were fired, the complainant's mother, Rachel Areola, exited her bedroom and saw a hooded black man with a gun "searching" her son who was hunched-over on the floor. (9 RR 156-57, 178). Areola described the black man's appearance as follows:

> I remember seeing something…on his right or his left side of his face, but I really couldn't tell—I don't know if it was a glare coming in from the light in the bedroom, or I didn't know if it was a tattoo, a scar, a cut, I don't know. I just remember seeing something on his left side…[and he was] About 5'10 or 5'11...[and] slender built.

(9 RR 167, 169); *see also* (1 CR 106) (depicting a sizable scar marking left side of Ryan Hardwick's face in same photo Daniel Martinez signed, dated, and identified as accurately depicting "Trae"); (8 RR 140, 193) (establishing Martinez first met Hardwick at appellant's apartment where Hardwick introduced himself as "Trey"); (10 RR 208) (admitting Hardwick was also forty [40] pounds lighter on offense date than when he testified). Hardwick has been shot in the face before. (10 RR 144, 172-173). When Areola heard an unknown male's voice say, "Get her," [9 RR 161]; [8 RR 131], the gunman turned and pointed the gun at Areola and clicked it three [3] times. (9 RR 159-162). Areola then ran into her bedroom and called 911. (9 RR 163, 182).

In a statement given to the police later that same day, Areola admitted she never did see a second suspect. (9 RR 170, 181). When the police showed Areola an array of photos wherein appellant appeared as "number three [3]," Areola selected "[n]umber one [1]." (9 RR 188). Areola also gave the police the names of Raheem Stephens and Anthony Manuel as possible suspects. (9 RR 187).

Areola also testified that her son had never held a job, never earned so much as a GED, and yet "he did have money and I knew he had money." (9 RR 173); *see also* (9 RR 174) (asking, "And it never occurred to you that some of his cash was coming from the sale of drugs out of your apartment? A: No").

Detective Howard established the complainant's mother called 911 at 2:25 a.m. on October 22, 2014. (9 RR 204, 230). Detective Howard interviewed Martinez that same morning, and obtained his complete confession four [4] days later, on Sunday, October 26, 2014. *See, e.g.*, (8 RR 152, 195) (stating by Martinez, "[Detective Howard] Told me I could get charged with capital murder, punishable by death"); (9 RR 208, 238) (establishing date of that confession and admitting by Howard, "I may have told [Martinez] that capital murder carries the death penalty").

Angel Mendez lived in the same complex as the complainant and worked at a nearby video-game store. (9 RR 44, 46, 84). Whether Mendez bought marijuana from the complainant is unclear. He was never asked. Mendez did say that, while walking his dog sometime between 1:00 and 1:45 a.m. on October 22, 2014, he witnessed two [2] African-American "figures" with "raised hoodies" walk past him. (9 RR 54-55, 72-74). After his walk, Mendez continued watching the hooded figures from inside his apartment, where his view was partially obstructed by "bushes" and a "staircase." (9 RR 77-78). When the two [2] men walked away, Mendez went to bed. (9 RR 63, 84).

On October 27, 2014 (fully five days after the shooting), Mendez called the police and told them he might have information about an incident that occurred in his complex. (9 RR 63, 86, 246). Later still, on November 3, 2014 (fully twelve [12] days

after the shooting), Mendez met with Detective Mark Duke who showed him a lineup of "black-and-white" photos. (9 RR 68, 87, 94); (14 RR [SX-51] 72-81]); *but see, e.g.*, (9 RR 10-11) (confirming array Duke "blindly administered" to Mendez was actually in color); (9 RR 92) (admitting that Duke had to show Mendez lineup containing appellant *twice* before Mendez attempted any identification).[7] On a "statement of certainty" attached to the array, Mendez wrote, "I feel 80 percent sure that the man in Photo Number 3 was sitting in front of my apartment on the night of the crime." (9 RR 97); (14 RR [DX-11] 109).

Mendez also admitted that, by the time he was first interviewed on November 3, 2014, Mendez had been inundated by various news reports, which may well have included photos of appellant. *See, e.g.*, (9 RR 84) (admitting, "I had went on Facebook and there was a news article by KENS 5 that there had been a murder at my apartment complex"); (9 RR 55) (stating, "I woke up in the morning and I found out on the news that there was a murder at my apartment complex and that police were searching for two individuals").

Finally, and perhaps most importantly, given more than two [2] years passed between the crime and time of trial in December 2016, on the offense date,

7. Duke, for his part, claimed he did nothing to help Mendez render an identification. (9 RR 76). Detective Howard confirmed he had complied the array and that "number three [3]" was appellant. (9 RR 219).

October 22, 2014, Mendez was nineteen [19] years old, [9 RR 44], Thompson was twenty [20] years old, [9 RR 142], Martinez was twenty-two [22] years old, [8 RR 135], and Hardwick was twenty-five [25] years old. (10 RR 108). However, "the appellate record is completely devoid of any evidence regarding Franklin's birthdate."[8]

---

8. *Franklin v. State*, 04-17-00139-CR, 2018 WL 3129464, at *5 (Tex.App.—San Antonio 2018, pet. granted) (mem. op., not designated for publication).

Notably, while Martinez may once have known appellant's birthdate, the record includes no evidence of the actual birthdate, itself. Martinez' direct examination illustrates:

> Q: On October 26th…did you tell Detective Howard the identities of Demond Franklin and Ryan Hardwick?
>
> A: Yes, ma'am.
>
> …
>
> Q: As matter of fact, you…were such a good friend with Demond, you even knew Demond's date of birth, didn't you?
>
> A At the time I did, yes.

(8 RR 196).

Along the same lines, detective Howard's direct examination includes the following:

> Q: … Okay…in the interview that you had with Daniel on October 26th, didn't he tell you [that]…he even had Demond's date of birth that he provided for you?
>
> A: Are you asking if he gave me his birth date?
>
> Q: Yes.
>
> A: I don't recall him knowing his birth date.
>
> Q: If it's on the video, would that be accurate?
>
> A: Sure, if it's on the video.

(9 RR 241). No video of Martinez' interview was ever admitted in this case.

Ground for Review No. 1

I. SUMMARY OF THE ARGUMENT

THE COURT OF APPEALS ERRED IN RULING THAT APPELLANT'S *MILLER v. ALABAMA* CLAIM WAS FORFEITED BY INACTION.

II. ARGUMENT

A. Guiding Legal Principles

An "automatic" sentence of life-without-parole is cruel and unusual when applied to a person not yet eighteen [18] years old at the time of the offense. *Miller v. Alabama*, 567 U.S. 460, 479 (2012). Further, because *Miller* announced a new substantive rule, its holding has been ruled to be fully retroactive. *Montgomery v. Louisiana*, 577 U.S. __ ; 136 S.Ct. 718, 736 (2016); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014). What's more, a defendant cannot forfeit a *Miller* claim by failing to raise that claim at trial. *See Garza v. State*, 435 S.W.3d 258, 262 (Tex. Crim. App. 2014) (holding, "sentencing claims…embraced by *Miller* are not forfeited by inaction…Accordingly, we hold that Garza's claim was not forfeited by his failure to urge his claim in the trial court") (hereinafter *"Garza I").*

A trial objection is also unnecessary to preserve error caused by legally insufficient evidence. Thus, sufficiency of the evidence, either to prove or to rebut a *Miller* claim, is a point defendants should be able to raise for the first time on direct appeal. *Cf. Wood v. State*, 486 S.W.3d 583, 591 (Tex. Crim. App. 2016) (Keller, P.J.,

dissenting) (noting, "sufficiency of the evidence [for an enhancement paragraph] *can* be used for the first time on appeal, and (except for venue) our law does not purport to allow presumptions to substitute for the introduction of evidence…The presumption of regularity that applies to judgments cannot be used to relieve the State of its burden to prove an enhancement allegation beyond a reasonable doubt") (emphasis in original).

B. Application of Law to Facts

Here, the court of appeals held:

> We conclude that[,] because Franklin failed to raise the issue of whether he was eighteen years' [sic] old at the time of the offense, the issue cannot be raised now on direct appeal.

Franklin v. State, 04-17-00139-CR, 2018 WL 3129464, at *5 (Tex.App.—San Antonio [June 27, 2018], pet. granted) (mem. op., not designated for publication). This ruling explicitly contradicts precedent both of this Court and of the instant court of appeals, itself. The leading case, as noted, is *Garza v. State*, which—like this case—was tried in the 290th Judicial District Court, initially affirmed by the Fourth Court of Appeals, and then ultimately reversed by this Court. In so doing, this Court held:

> We reverse the court of appeals' decision because it conflicts with this Court's subsequently delivered opinion in *Ex parte Maxwell*….[which necessarily decided that]…substantive status-based and individualized-sentencing claims under the Eighth Amendment and embraced by *Miller* are not forfeited by inaction.

Garza I, 435 S.W.3d at 261, 262. The Fourth Court of Appeals acknowledged this ruling on remand. *See Garza v. State*, 453 S.W.3d 548, 550 (Tex. App.—San Antonio 2014, pet. ref'd) (hereinafter: "*Garza II"*) (stating, "the court of criminal appeals…[held] 'Garza's claim was not forfeited by his failure to urge his claim in the trial court").

C. Conclusion

Given our record is as devoid of precisely the same evidence that resulted in a new sentencing hearing for James Garza, no less relief should have been granted here. The only questions that remain are whether, on remand: (1) will the trial court be instructed to enter a specific sentence, or to conduct a new fact-finding proceeding?; and (2) if the latter, who will bear the burden to prove the defendant's age at the time of the offense?

Ground for Review No. 2

I. SUMMARY OF THE ARGUMENT

THE COURT OF APPEALS ERRED BY RULING THE DEFENDANT'S AGE AT THE TIME OF THE OFFENSE IS AN AFFIRMATIVE DEFENSE FOR WHICH THE DEFENDANT BEARS THE BURDEN OF PROOF.

II. ARGUMENT

A. Guiding Legal Principles

When remanding *Garza*, the Fourth Court of Appeals did more than simply order that a corrected sentence be entered. It ruled a defendant's age at the time of the offense is an affirmative defense for which the defendant bears the burden of proof. *See Garza II*, 453 S.W.3d at 555 (stating, "we hold that like mental retardation, Garza's age at the time of the offense is in the nature of an affirmative defense, and it is his burden to prove by a preponderance of the evidence that he was [not over age] seventeen at the time of the offense in order to avoid the penalty of life without the possibility of parole").

Later, the court of appeals used *Garza II* to decide this case. *See Franklin v. State*, 04-17-00139-CR, 2018 WL 3129464, at *5 (Tex.App.—San Antonio 2018, pet. granted) (mem. op., not designated for publication) (holding, "A defendant's age at the time of the offense is in the nature of an affirmative defense, which must be proven by the defendant by a preponderance of the evidence regardless of whether the issue is presented at trial or in a habeas proceeding").[9]

B. Application of Law to Facts

9. *But see Garza I*, 435 S.W.3d at 269 (Alcala, J., concurring) (observing stating, "The majority opinion [unnecessarily suggests]…that the preservation-of-error requirements applicable on direct appeal are identical to those required for obtaining habeas corpus relief, a principle that I disagree has been definitively established).

To reach its conclusion, the court of appeals relied heavily on exactly two [2] cases, both of which deal with mental retardation. *See Franklin*, 2018 WL 3129464, at *4 (citing *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004); & *Hall v. State*, 160 S.W.3d 24 (Tex. Crim. App. 2004)). But, *Hall* & *Briseno* were both decided in 2004, long before this Court received the decisions in of *Miller v. Alabama*, *Montgomery v. Louisiana*, & *Ex Parte Maxwell*, all of which are more germane because they involve age at the time of the offense.[10] And, while *Hall* & *Briseno* both may retain some claim to being "good law," they have each also had considerable problems with the federal courts. Before reaching their current forms, for example, the United States Supreme Court vacated *Hall*, and later abrogated *Ex parte Briseno*, altogether, albeit on slightly different grounds. *See, e.g., Hall v. Texas*, 537 U.S. 802 (2002) (vacating judgment for reconsideration in light of *Atkins v. Virginia*, 536 U.S 304 (2002)); *Moore v. State*, 137 S. Ct. 1039 (2017) (abrogating standard announced in *Briseno* for evaluating mental retardation).

Guided only by precedent from 2004, the court of appeals equated age at the time of the offense and mental retardation because "the absence of [either fact] does not increase the penalty of the crime beyond the statutory maximum, and thus, [neither fact is] an element of the [instant] offense." *Franklin*, 2018 WL 3129464 at *4.

10. *See, e.g., Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. __ ; 136 S. Ct. 718 (2016); *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014).

However, this reasoning is peculiar because it's nearly impossible to understand how any legislature would use a fact that, on its face, reduces culpability to *ever* increase the maximum penalty affixed to a given offense. Which is to say, simply that a person's young age at the time of the offense does not work to increase the maximum penalty for an offense provides no reason to conclude that age at the time of the offense cannot, therefore, be an element of the offense charged here. Indeed, the operative question is not what Texas statutes allow in the *absence* of a defendant being either young or mentally retarded, but rather what our legislature has said shall happen in the *presence* of those disabilities. Thus, even in the context of mental retardation, the reasoning advanced below would seem to have either misconstrued or misapplied the rules announced in *Apprendi v. New Jersey* & *United States v. Booker*. In so doing, the court of appeals has adopted a standard that is practically impossible to meet.

More importantly, even if *Apprendi* & *Booker* could be read in the manner suggested below, facts that increase the maximum penalty prescribed by law are not the only ones that serve to create "legal elements of the offense" that the State must prove to a jury beyond a reasonable doubt. Also in that category are facts that increase the mandatory *minimum* penalty prescribed for a given offense. The following from the United States Sentencing Commission illustrates this point:

I]n *Apprendi v. New Jersey*, [the U.S. Supreme Court held] that any facts that increase a criminal defendant's maximum possible sentence are considered "elements" of the criminal offense, which must be proved to a jury beyond a reasonable doubt. In the context of mandatory minimums, [however,] the Court [later decided]…in *Harris v. United States* that *Apprendi* did not apply to facts that would increase a defendant's mandatory *minimum* sentence, and therefore that a judge could constitutionally decide to apply a [harsher] mandatory minimum sentence based on facts not proven to a jury.

Overruling the *Harris* decision…[the same Court, in *Alleyne v. United States*, 133 S. Ct. 2151 (2013),] held that facts that increase a mandatory minimum penalty are [also] elements that must be submitted to a jury and found beyond a reasonable doubt…[because increasing] the legally prescribed floor indisputably aggravates the punishment and "heightens the loss of liberty associated with the crime," [and] because the government can [then] invoke the mandatory minimum to require a harsher punishment than would have resulted otherwise.

The Court reasoned that…"the core crime and the [additional] fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." The Court concluded that only by defining facts that increase the mandatory minimum sentence to be "elements" of the offense…[may a] defendant [accurately]…predict the potential penalties from the face of the indictment, and [in so doing] the Court has preserved "the historic role of the jury as an intermediary between the State and criminal defendants."

…

[*Alleyne* & its progeny have therefore] directly…[altered] the way in which mandatory minimum enhancements must be charged and proven by the government.

United States Sentencing Commission, "Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System" (2017), p. 23-24 (citations and footnores omitted).[11]

The Sixth & Eighth amendments to the U.S. Constitution obviously apply with equal vigor to state prosecutions via the Fourteenth Amendment. So, in capital litigation, and in direct response to *Miller v. Alabama*, the Texas legislature enacted a statute that recognizes two [2] different offenses, namely: (1) "regular capital murder" [under Texas Penal Code § 12.31(a)(1)]; and (2) "aggravated capital murder" [under Texas Penal Code § 12.31(a)(2)]. And each offense is separated from the other by exactly one [1] substantive element: the defendant's age at the time of commission. Likewise, each such offense carries a distinct mandatory minimum punishment, and not by a small margin: the regular capital offense includes a possibility of parole after forty [40] calendar years, while the mandatory minimum sentence for the aggravated offense is life without parole. *See* TEX. GOV. CODE § 508.145(b) (West Supp. 2014) (allowing capital defendants possible parole after forty [40] calendar years if they were not yet eighteen [18] at the time of the offense).

11. *See* (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf) (last accessed 01-26-19).

Also, and of equal importance, the *Alleyne* decision has now: (1) removed questions of fact over a defendant's age at the time of the offense from the sentencing phase altogether; and (2) rightly required that additional fact to be both pled in the indictment and proven at guilt innocence (at least if the State wishes to pursue the harsher of the two [2] available penalty options prescribed by law). Likewise, basic Double Jeopardy principles would, in turn, demand that, when, as here, a defendant's birthdate has neither been pled nor proven, the statutory maximum penalty available upon remand would be that provided by Texas Penal Code § 12.31(a)(1).

Further, the presence of clear legislative pronouncements governing age at the time of the offense, and absence of such standards for mental retardation, is not the only difference between these two [2] disabilities.[12] The primarily constitutional safeguards that protect mentally challenged individuals only come into play after an

12. *Compare Ex parte Moore*, 548 S.W.3d 552, 556, 560 (Tex. Crim. App. 2018) (observing, "absent legislative action, the decision to modify the legal standard for intellectual disability rests with this Court and that, "[absent legislative action] the Dianositic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5) controls the approach to resolving the issue of intellectual disability in death penalty cases"); *with, e.g.*, TEX. PENAL CODE § 8.07(c) (West 2017) (providing, "No person may, in any case be punished by death for an offense committed while the person was younger than 18 years"); TEX. PENAL CODE § 12.31(a) (West 2017) (providing, "An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in [T.D.C.J.] for…life, if the individual committed the offense when younger than 18 years of age; or…life without parole, if the individual committed the offense when 18 years of age or older"); TEX. CRIM. P. CODE art. 37.071 (West 2017) (stating, "If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment or to life imprisonment without parole as required by Section 12.31 Penal Code").

individual is convicted and the State holds the conscious objective or desire to cause the death of that person. However, when, as here, the death penalty is waived, the standards governing mental retardation are largely inapposite.

Further, had our legislature intended to create an affirmative defense in § 12.31(a)(1) & (2), it could surely have done so more explicitly, just as it did with the code provisions governing "self-defense" and "sudden passion." In each of those instances, the legislature clearly placed a burden on a defendant to prove: (1) specific substantive elements; (2) at a particular stage of the proceedings; (3) by an enumerated or imputed standard of evidence. *See, e.g.*, TEX. PENAL CODE § 9.32 (West 2017) (setting forth elements of "Deadly Force In Defense of Person"); *Id.* § 19.02(d) (noting, "At the punishment stage of trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause"). Section 12.31(a)(1) & (2), meanwhile, do none of those things.

Mental retardation is also a more inherently murky and amorphous construct because it depends so heavily upon the often conflicting and subjective whims of hired experts. Age at the time of the offense, by contrast, involves a much more "bright line" determination that turns exclusively on a single date-certain in the past. At the same time, mental retardation at least depends on facts in existence

(and thus which may be evaluated) at or near the time of the offense, whereas a person's date of birth, by definition, is an accident that happens far earlier in time, i.e., as much as eighteen [18] years *prior* to the offense date. As such, the court of appeals' supposition that "[defendants will] naturally have more convenient access to documentation or other evidence establishing their age at the time of the offense [than the State does]," will absolutely ***not*** be true for a significant number of young people. One can easily imagine, for instance, a mentally-ill, homeless, or emigrated teenager who either does not know, or who simply has no way to prove, when she was born.[13]

Also worth noting is that, if a defendant presents so much as a scintilla of evidence to support an inference that she was not yet eighteen [18] on the offense date, a *de facto* burden will always effectively shift to the State to meet that inference with rebuttal evidence. So, there's little reason not to continue placing the burden where it has traditionally belonged all along, with the State, and in the process also stay on the right sides of the Sixth & Eighth Amendments.[14]

---

13. Similarly, most infants cannot see, much less read, at the time they are born, and so most of what lay people think they know about their own birthdates is actually based on hearsay.

14. As a matter policy, no trial counsel—even those obligated to represent a client of advanced years—should ever be placed in the ethical conundrum of either having to produce unreliable evidence to support her client's claimed age, or worse, disclose reliable evidence that conclusively negates that claim. As it is, *Garza II* places defense counsel in just such a predicament whenever, as here, a client exercises his fundamental right to a jury at both phases of trial. *See* (1 CR 158); (7 RR 52-53) (showing appellant elected "The Jury" for punishment if convicted).

In today's electronic day and age, placing the burden on the State to plead and prove a person's birthdate at guilt/innocence is certainly not asking too much. In most cases the State will have equal, if not greater, access to such proof as the defendant's birth certificate, driver's license, identification card, etc. And even in those rare instances when no such evidence is available, no injustice will result given the only other option is forty [40] calendar years' imprisonment before the convicted person may even think about applying for parole. TEX. GOV. CODE § 508.145(b) (West Supp. 2014). But when, as here, the record is utterly devoid of any evidence of the defendant's age at the time of the offense, "the tie should go to the defendant," [15] and a new sentencing hearing is thus in order. *See United States v Booker*, 543 U.S. 220, 226 (2005) (holding, "If a State makes an increase in a defendant's authorized punishment contingent on [a] finding of fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt").

Nevertheless, the court of appeals would still presume all defendants are age-appropriate for the harshest sentence prescribed by law—life without parole—despite a categorical ban on that result for Texans not yet eighteen [18] at the time of the offense. Under *Garza II*, it's only a matter of time before a person dies in prison who would otherwise have been paroled due to her young age at the time of the offense.

15. *United States v. Santos*, 553 U.S. 507, 514 (2008).

C. Conclusion

This Court has never placed a burden on young defendants to prove when they were born or be *automatically* sentenced to the harshest penalty options available under the law. By its own plain language, Texas Penal Code § 12.31(a) does more than merely "exempt" a certain class of people from a single maximum penalty. Rather, the provision establishes *different* offenses, with distinct mandatory minimum penalties, that depend solely on the age of the defendant at the time of offense. TEX. GOV. CODE § 508.145(b) (West Supp. 2014). Thus, a person's age at the time of the offense is fact the State should have to plead and prove beyond a reasonable at guilt innocence.

In an age when identity-information is nearly ubiquitous, placing the burden where it has traditionally belonged all along will work no undue hardship on the State. This is especially true in cases when, as here, the State has voluntarily waived the death penalty. In such instances, and when sufficient facts so dictate, the State can simply condition its waiver on a corresponding waiver, or admission, by the defendant concerning his age at the time of the offense. But, in a case like this, where the record is devoid of any such a waiver, admission, or finding of fact, appellant's sentence should be reformed to life with a possibility of parole after forty [40] calendar years.[16]

16. *See Thornton v. State,* 435 S.W.3d 289, 299-300 (Tex. Crim. App. 2014) (holding that, when legally insufficient evidence relates only to an aggregating element, appellate courts are authorized to reform judgment to delete that single element).

Ground for Review No. 3

I. SUMMARY OF THE ARGUMENT

EVEN IF DEFENDANTS BEAR THE BURDEN TO PROVE WHEN THEY WERE BORN, THE COURT OF APPEALS ERRED IN AFFIRMING THE INSTANT JUDGMENT BECAUSE THE TRIAL COURT NEVER SECURED AN EXPRESS WAIVER FROM APPELLANT, ADMISSION FROM APPELLANT, OR FINDING OF FACT THAT APPELLANT WAS INDEED OVER THE AGE OF EIGHTEEN [18] ON OCTOBER 22, 2014

II. ARGUMENT

A. Guiding Legal Principles

In *Garza*, both this Court and the court of appeals agreed that a defendant's age at the time of the offense is a question of fact that must be resolved by a factfinder. *See, e.g.*, *Garza v. State,* 435 S.W.3d 258, 262 (Tex. Crim. App. 2014) (noting in *Ex parte Maxwell* relief included "vacating…[the] life-without-parole sentence and remanding the case for further sentencing proceedings permitting the factfinder to determine whether…sentence should be assessed at life with or without parole"); *Garza II,* 453 S.W.3d at 553 (observing that "[b]oth parties agree there must be a factual determination as to Garza's age at the time of the offense," and ruling, "we remand this matter to the trial court for resentencing in accordance with this court's opinion").

However, this Court did not decide in which *Marin* category the right to such fact-finding falls. This Court observed:

> [T]he *Maxwell* majority did not purport to discern whether [Maxwell's] *Miller* claim fell within *Marin*'s 'absolute prohibitions' or 'waiver-only' category. It was sufficient for the majority opinion to hold that Maxwell's claim was simply not forfeited. Likewise, this case does not require that we further define where in *Marin* 's categorical structure a *Miller* claim is properly placed. We reserve such a decision for a matter that properly presents the issue.

Garza v. State, 435 S.W.3d 258, 262 (Tex. Crim. App. 2014); *see also Id.* at 264 (Price, J., concurring) (stating, "I agree we need not decide that today"). Accordingly, the right involved here is at least a *Marin* category two [2] right.

B. Application of Law to Facts

A *Marin* category two [2] right may only be disregarded if the defendant expressly waives that right. Here, the only express statement appellant ever made came when he elected "The Jury" to assess punishment if convicted. (1 CR 158). The trial court then ruled it would honor appellant's election only if he was convicted of the lesser-included offense of felony murder [Count II]. (7 RR 52-53). In so doing, the trial court deprived appellant of his right to present or demand evidence to support his claim and to a factual determination by the jury. Given the right at issue is not "forfeitable," i.e., does not fall in *Marin* category three [3], the trial court erred by assessing life with no parole without first obtaining either an express waiver from appellant, admission by appellant, or finding of fact resolving whether appellant was indeed over the age of eighteen on October 22, 2014. *See Garza I*, 435 S.W.3d at 263

(stating, “we hold that Garza’s claim was not forfeited by his failure to urge his claim in the trial court”). Which is to say, even if appellant did somehow bear a burden to prove his age at sentencing, the court nevertheless reversibly erred by not allowing appellant an opportunity to meet that burden before his jury.

C. Conclusion

If appellant’s sentence is not reformed per *Thornton*, this Court should, at a very minimum, remand this case back to the trial court for a new punishment hearing where another duly authorized jury may resolve the unanswered question-of-fact concerning appellant’s age at the time of the offense.

PRAYER

WHEREFORE, PREMISES CONSIDERED, appellant respectfully prays the Honorable Court of Criminal Appeals grants either: (1) a Thornton reformation of his sentence, to life with a possibility of parole after forty [40] calendar years; or (2) a new jury punishment hearing.

Respectfully submitted,

/s/ *Dean A. Diachin*

DEAN A. DIACHIN
Bexar County Assistant Public Defender.
Paul Elizondo Tower
101 W. Nueva St., Suite 370
San Antonio, Texas 78204
Phone: (210) 335-0701
Fax: (210) 335-0707
TBN: 00796464
dean.diachin@bexar.org

ATTORNEY FOR APPELLANT.

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies this brief was generated by computer, and thus is limited to fifteen-thousand (15,000) words. The "word count" function within Microsoft Word 10.0 indicates this brief consists, in relevant part, of no more than 5,148 words. The brief therefore complies with TEX. R. APP. P. 9.4(i)(2)(B) (West 2017).

/s/ *Dean A. Diachin*

DEAN A. DIACHIN
Bexar County Assistant Public Defender.

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Petition for Discretionary Review has been delivered to the Bexar County District Attorney's Office, Appellate Section, at the Cadena-Reeves Justice Center, 300 Dolorosa Street, San Antonio, Texas on this 28th day of January, 2019.

/s/ *Dean A. Diachin*
DEAN A. DIACHIN
Bexar County Assistant Public Defender.